

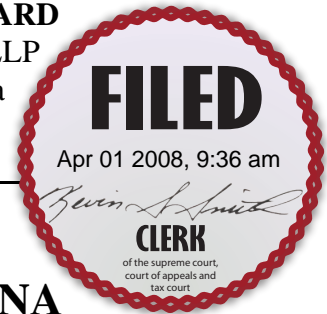
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL W. THOMAS,
Appellant-Defendant,

VS.

SALIN BANK AND TRUST COMPANY,
Appellee-Plaintiff.

No. 02A04-0708-CV-486

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0604-MF-100

April 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael W. Thomas appeals a summary judgment award of \$122,492.92 to Salin Bank and Trust Company (“Salin Bank”). We reverse and remand.

Issues

We re-state the issues as follows:

- I. Whether the trial court erroneously concluded that Thomas waived the argument that his liability was limited to fifty percent of the principal debtor’s indebtedness due to Salin Bank; and
- II. Whether the trial court erroneously interpreted Thomas’s Third Commercial Guaranty when calculating the damage award.

Facts and Procedural History

Beginning in October 2003, Dan Balyeat and Balyeat Homes, Inc. (“Balyeat”), executed a series of promissory notes in favor of Salin Bank pursuant to a construction line of credit. In conjunction with the notes, Thomas executed a series of commercial guaranties.

On October 1, 2005, Thomas executed and delivered to Salin Bank a Third Commercial Guaranty,¹ which provided that “[t]he maximum liability of the Guarantor under this Guaranty shall not exceed at any one time 50.000% of all indebtedness; however, in no event to exceed \$172,000.00 plus all costs and expenses of (A) enforcement of this Guaranty and (B) collection and sale of any collateral securing this Guaranty.” Appellant’s App. at 149.

Balyeat subsequently defaulted on its obligations to Salin Bank. On April 27, 2006, Salin Bank filed a complaint against Balyeat and Thomas, alleging default on the promissory

notes and guaranties respectively. Thomas filed his answer, affirmative defenses, and jury demand on June 20, 2006. On September 28, 2006, the trial court held a hearing at which Balyeat failed to appear. The trial court entered a default judgment against Balyeat in the amount of \$391,216.63,² plus post-judgment interest of eight percent per annum. *Id.* at 164.

On February 9, 2007, Salin Bank filed a motion for summary judgment against Thomas as guarantor of Balyeat's indebtedness and a motion to strike Thomas's affirmative defenses. On April 13, 2007, Thomas filed a memorandum in response, and on May 23, 2007, he filed a motion to file an amended answer. The trial court held a hearing on all motions on May 29, 2007. On June 29, 2007, the trial court granted Thomas's motion to file an amended answer and, at the same time, granted Salin Bank's motion for summary judgment. In its order, the trial court requested that Salin Bank submit a proposed order. Both Salin Bank and Thomas presented proposed orders. Salin Bank's proposed order asked for damages in the amount of \$122,492.92 plus interest accruing thereafter at eight percent per annum. Thomas's proposed order asked that damages be limited to \$61,246.46, an amount representing fifty percent of the damages proposed by Salin Bank.

On July 19, 2007, the trial court issued an order finding that Thomas had waived argument regarding a fifty-percent limitation on damages and entering damages against him in the amount of \$122,492.92, plus eight percent interest. The trial court entered damages as follows:

¹ The trial court's July 19, 2007 order is based on Thomas's Third Commercial Guaranty; therefore, we will discuss the language of Thomas's First and Second Guaranties where applicable, but will focus our discussion on the language of the Third Commercial Guaranty.

² This figure was later reduced by \$305,733.63, representing proceeds Salin Bank received from the sale of one of Balyeat's properties.

\$391,216.63	September 28, 2006 Judgment (post-judgment interest to accrue at 8% per annum.)
+ <u>6,517.00</u>	Interest from September 28, 2006, up to and including December 13, 2006.
\$397,733.63	
- <u>305,188.54</u>	Proceeds received by Salin Bank on December 13, 2006 from real estate sale.
\$ 92,545.09	
+ <u>4,015.44</u>	Interest from December 13, 2006, up to and including June 29, 2007.
\$ 96,560.53	Total principal and interest up to and including June 29, 2007.
14,076.32	Tax and drainage/ditch expenses.
+ <u>17,432.17</u>	Attorneys fees, costs and expenses.
\$128,069.02	Sub-total
- <u>5,576.10</u>	Minus agreed vendor expenses.
\$122,492.92	Total damages up to and including June 29, 2007.

Id. at 20. The trial court's July order also granted Salin Bank permission to make application for additional fees and costs incurred in collection thereafter and assessed those costs to Thomas. Thomas now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Waiver

Thomas does not challenge the propriety of summary judgment, but contends that the trial court erred in assessing damages against him in an amount equal to one hundred percent of the principal debtor's indebtedness. Thomas specifically asserts that the trial court erroneously concluded that he had waived the argument that his liability was limited to \$61,246.46.

The trial court's July order reads in pertinent part as follows:

.... Defendant Thomas' Proposed Order asserts that the Guaranty only covers 50% of the debt and, therefore, the Defendant should be liable only for 50% of the proven indebtedness of the Plaintiff. Based upon this approach,

Defendant claims the guarantee only covers Sixty-one thousand two hundred forty-six dollars and forty-six cents (\$61,246.46).

However, the Court notes that *while the Defendant did assert, in the summary judgment filings, that the Defendant was only liable for 50% of the indebtedness of the Plaintiff, the Defendant did not make argument that the Defendant only owed 50% of the indebtedness now due.* The time for such argument has passed. The Plaintiff asserted amounts due in its summary judgment brief and filings and the Defendant made no such argument at that time. Such argument has been waived.

Appellant's App. at 19-20 (emphasis added).

We find the trial court's reference to the fifty-percent limitation to be confusing, if not contradictory, on its face. Moreover, the record is replete with references to the limitation, including the following:

THE COURT: You're saying that the debt that he guaranteed at one point was down to Three hundred some thousand and he sold the house for \$305,000, so there's only a little bit of debt left and he's only responsible for 50% of that but he also paid some things that he should get some equitable credit for, is that the essence of your argument?

[COUNSEL]: Yes, sir, that's one of my arguments, yes.

Tr. at 27.

[COUNSEL]: The Third and final Guaranty that was done October 1, 2005, is the 50%. That [Thomas] would only agree to guarantee 50% of the indebtedness.

THE COURT: Up to a certain ...?

[COUNSEL]: Yeah, up to a certain amount.

THE COURT: And, what was that amount?

[COUNSEL]: The amount was \$172,000.

THE COURT: Up to that amount?

[COUNSEL]: Yes, sir. Because the loan was for double that for roughly \$354,000 (sic). So, 50%.

Id. at 30.

THE COURT: Well, now, let me check with you on something. Let's say I totally agree with that and he in essence is saying, "Yes, Judge, it's the Third Guaranty. It is limited to 50%.["] Isn't the real argument here then not that but whether or not the Guaranty does, in fact, cover such so-called add-ons?

Id. at 33.

[COUNSEL]: [Thomas is] guaranteeing only a portion of the debt. Whereas we read it, if it's 50% of the amount of the debt which is only \$9,000 then we believe that the Court has to take away the amount that Mr. Thomas has already spent for this property on behalf of Salin Bank that he should be equitably, equitable subrogation for it.

Id. at 26.

Salin Bank relies on Thomas's reference to \$9,000 as support for the trial court's conclusion that Thomas waived his right to assert a fifty-percent limitation as to the total damages of over \$121,000. Specifically, Salin Bank argues that at the time of the May 29 summary judgment hearing, Thomas's failure to argue that the total amount due and owing was \$61,246.42 amounted to waiver. We disagree. Thomas cannot be held to have waived argument on figures not yet determined. The essence of his argument before the trial court was the fifty-percent limitation and not the exact dollar amount of the damage award, which has yet to be finalized even as of this date.³ We conclude that the trial court erred in finding

³ In its July order, the trial court specifically granted Salin Bank "leave to make application for additional fees and costs incurred in collection hereafter." Appellant's App. at 20.

that Thomas waived argument on the imposition of a damage award that exceeded fifty percent of Balyeat's indebtedness now due.⁴

II. Contractual Language and Damages

Because we conclude that Thomas did not waive argument regarding the alleged fifty-percent limitation on his liability as a guarantor, we now address the merits of his challenge. The interpretation of a guaranty is governed by the same rules applicable to other contracts. *Noble Roman's, Inc. v. Ward*, 760 N.E.2d 1132, 1137-38 (Ind. Ct. App. 2002). The extent of the guarantor's liability is determined by the terms of his contract. *Id.* "A guarantor is a favorite in the law, and he is not bound beyond the strict terms of his engagement." *Goeke v. Merch. Nat'l Bank & Trust Co.*, 467 N.E.2d 760, 769 (Ind. Ct. App. 1984), *trans. denied*. Instead, he is entitled to a strict construction of the contract in his favor. *Id.* His contract is to be construed based on the intent of the parties as ascertained from the language of the contract in light of the surrounding circumstances. *Noble Roman's*, 760 N.E.2d at 1138. The intentions of the parties to a contract are to be determined from the "four corners" of the document. *Ashbaugh v. Horvath*, 859 N.E.2d 1260, 1266 (Ind. Ct. App. 2007).

In general, where the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, ... the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding to the terms of the written contract.

⁴ Even apart from the foregoing analysis, we note that "[w]aiver may be avoided if the newly-raised issue was inherent in the resolution of the case, the other party had unequivocal notice of the issue below and had an opportunity to litigate it, or if the trial court actually addressed the issue in the absence of argument by the parties." *Grathwohl v. Garrity*, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007); *McGill v. Ling*, 801 N.E.2d 678, 687-88 (Ind. Ct. App. 2004), *trans. denied*. Certainly, the issue of the fifty-percent limitation (1) was inherent in the resolution as evidenced in the language of the final order; (2) was clearly known to Salin Bank at the time of the proceedings below; and (3) was actually addressed by the trial court.

However, the prohibition against the use of parol evidence is by no means complete. Indeed, parol evidence may be considered if it is not being offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract.... In addition, parol evidence may be considered to apply the terms of a contract to its subject matter and to shed light upon the circumstances under which the parties entered into the written contract.

Krieg v. Hieber, 802 N.E.2d 938, 943-44 (Ind. Ct. App. 2004). Ambiguities in a contract are to be construed against the party who employed the language and prepared the contract. *Goeke*, 467 N.E.2d at 769. In this case, Salin Bank drafted the guaranties.

The trial court based its damages calculation on the terms of the Third Commercial Guaranty, which provides in pertinent part: “[t]he maximum liability of Guarantor under this Guaranty shall not exceed at any one time 50.000% of all indebtedness; *however, in no event to exceed \$172,000.00* plus all costs and expenses of (A) enforcement of this Guaranty and (B) collection and sale of any collateral securing this Guaranty.”⁵ Appellant’s App. at 149 (emphasis added). The italicized phrase indicates an outer limit to be enforced when fifty percent of the indebtedness exceeds \$172,000. For example, if the total indebtedness were found to be \$400,000, the fifty-percent limitation would bring the figure to \$200,000, which then would be further limited by the \$172,000 maximum. Therefore, the contract clearly indicates that Thomas’s maximum liability would be the lesser of fifty percent of the indebtedness and \$172,000.

The Third Commercial Guaranty also contains the following language: “Lender’s rights under all guaranties shall be cumulative.” *Id.* Salin Bank relies on this language in

asserting that the three commercial guaranties must be read together. The Second Commercial Guaranty does not mention a fifty-percent limitation; therefore, Salin Bank argues that this omission renders ineffectual any limitation on percentage found in the remaining guaranties.

We note, however, that in his response to Salin Bank's summary judgment motion, Thomas designated the affidavit of Darrell Jagers, community president of Salin Bank. Jagers affirmed that Thomas informed him that "under no circumstances, would he give the Bank an unlimited guaranty for the obligation of [Balyeat]," that Jagers instructed the bank's state president to modify Thomas's obligation from unlimited to fifty percent, and that on April 1, 2005, Thomas was presented with a new guaranty. *Id.* at 260-61. Thus, Salin Bank's failure to include such a limitation in the Second Commercial Guaranty appears to have been an oversight in contradiction of the clear intent of the parties. The evidence of circumstances surrounding the execution of the Second Commercial Guaranty, combined with the clear language of the First and Third Guaranties, supports Thomas's contention that the fifty-percent limitation applies to Thomas's liability as guarantor of Balyeat's indebtedness pursuant to all three guaranties. The trial court erred in assessing damages against Thomas in an amount equal to one hundred percent of Balyeat's indebtedness.

Finally, to the extent that Thomas suggests that the fifty-percent limitation also applies to collection costs, attorneys' fees, and legal expenses, we note that the Third Commercial Guaranty provides: "Guarantor agrees to pay upon demand *all* of the Lender's costs and

⁵ Thomas's First Commercial Guaranty contains similar language regarding the fifty-percent limitation, with a maximum indebtedness of \$375,000.00. *See* Appellant's App. at 143. His Second

expenses, including Lender’s attorneys’ fees and Lender’s legal expenses, incurred in connection with the enforcement of this Guaranty.” *Id.* at 150 (emphasis added). This language, combined with the “plus all costs” language found in the maximum liability section of Thomas’s Third Commercial Guaranty, *see id.* at 149, indicates the parties’ intent that the fifty-percent limitation be inapplicable to the sums representing collection costs, attorneys’ fees, and legal expenses. The trial court correctly assessed one hundred percent of those damages against Thomas. Based on the foregoing, we reverse the trial court’s damage award and remand with instructions to re-assess the damages in accordance with this opinion.

Reversed and remanded.

BAILEY, J., and NAJAM, J., concur.

Commercial Guaranty, addressed below, did not contain any language regarding a fifty-percent maximum.